

UNITED STATES OF AMERICA,)
)
 Plaintiff.)
)
 v.) No. 4:90CR30(JCH)
)
 FRANCISCO SANTANA,)
)
 Defendant.)

This matter is before the Court upon defendant's motion to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2) [Doc. #69].

Citing United States v. Booker, 125 S. Ct. 738 (2005), defendant argues that the United States Sentencing Guidelines ("Guidelines") have been "lowered by the Sentencing Commission" such that 18 U.S.C. § 3582(c)(2) allows this Court to modify his sentence.

In Booker, the Supreme Court held that 18 U.S.C. § 3553(b)(1) - by which federal courts are required to apply the Guidelines - is incompatible with an offender's sixth amendment rights and must be severed and excised from the Sentencing Reform Act of 1984. United States v. Booker, 125 S. Ct. at 756. Consequently, the Guidelines are now advisory. Id. at 757. This

Court rejects defendant's argument that the switch from the mandatory application of the Guidelines to the advisory nature of the Guidelines constitutes a "lowering" of the Guidelines as used in § 3582(c)(2). Even if the change from mandatory to advisory constitutes a "lowering" of the Guidelines, such action was not taken - as § 3582 requires - by the Sentencing Commission.

Accordingly,

IT IS HEREBY ORDERED that defendant Santana's motion to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2) [Doc. #69] is **DENIED**.

Dated this 13th day of June, 2005.

/s/Jean C. Hamilton
UNITED STATES DISTRICT JUDGE